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No.

In the Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,

Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners,

Respondents

BRIEF OF RESPONDENTS PENNSYLVANIA HORSE RACING COMMISSION, ANDREW R. JOHNSON, A. MARLYN MOYER and WILLIAM R. GROSS, Horse Racing Commissioners, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Where the Pennsylvania Supreme Court has specifically held that a state agency, the Pennsylvania Horse Racing Commission, has authority under state law to promulgate a regulation fixing jockeys' fees, is that agency entitled to the state-action exemption from antitrust liability?

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MISCELLANEOUS:

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Opinion of the Attorney General of Vermont, Opinion No. 24-80, 1979-2 Trade Cas. (CCH) ¶62,912 (September 6, 1979) 14

COUNTER-STATEMENT OF THE CASE

This action is one of three lawsuits brought by various horse owners and/or trainers in the Commonwealth of Pennsylvania which challenge a regulation promulgated by the Pennsylvania Horse Racing Commission.[1] The regulation in question amends a prior regulation of the Commission first promulgated in 1968, which established riding fees for jockeys.

The amendment to the jockey fee schedule was first proposed at a Pennsylvania Horse Racing Commission meeting on July 19, 1978 and published in the Pennsylvania Bulletin as a proposed regulation on September 2, 1978. At an October 18, 1978 meeting, the Commission adopted the regulation which became effective upon the publication in the Pennsylvania Bulletin on November 25, 1978.

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[1] The first lawsuit commenced was *Gilligan v. Horse Racing Commission*, which was filed on November 18, 1978 in Pennsylvania Commonwealth Court. The second lawsuit is the instant case which was commenced in January, 1979. The third lawsuit was *Horsemen's Benevolent and Protective Ass'n., Inc., Pennsylvania Division v. Pennsylvania Horse Racing Commission et al. (HBPA)*. That lawsuit was commenced in May, 1981 as a class action lawsuit alleging a civil rights violation and violations of federal antitrust laws. Petitioners attempted to withdraw *Euster* and simultaneously substitute *H.B.P.A.* However, the district court denied that motion. Subsequently the Horse Racing Commission filed a motion to dismiss in *H.B.P.A.* which was granted by the district court. The district court's opinion in *H.B.P.A.* was based upon substantially the same rationale as was enumerated in *Euster*. Plaintiffs then appealed the decision of the district court which was affirmed by the Third Circuit.

This action was originally commenced in January, 1979. Defendants included the Pennsylvania Horse Racing Commission, its members, and Eagle Downs Racing Association.[2] Plaintiffs alleged various civil rights violations, violations of federal antitrust laws, and asserted a pendent state claim. The Horse Racing Commission filed a motion to dismiss and the District Court dismissed all claims against the Horse Racing Commission except the antitrust claim. The District Court based its refusal to dismiss the antitrust claim on a decision of the Pennsylvania Commonwealth Court in *Gilligan v. Pennsylvania Horse Racing Commission*, 46 Pa. Commonwealth Ct. 595, 407 A.2d 466 (1979).

Gilligan was filed in Pennsylvania Commonwealth Court several months before the instant case. Plaintiffs, in *Gilligan*, alleged, among other things, that the Pennsylvania Horse Racing Commission had no authority to promulgate a jockey fee schedule. The Pennsylvania Commonwealth Court ruled that without specific statutory language authorizing the Commission to promulgate jockey fees, the Commission was without power in this matter.

Subsequently an appeal was taken by the Horse Racing Commission from the Commonwealth Court's decision. In *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980), the Pennsylvania Supreme Court reversed the decision of the Commonwealth Court and held that the imposition of a jockey fee schedule was simply part of a comprehensive scheme of regulation consistent with, in fact necessary to accomplish, the legislative goals of the Pennsylvania General Assembly. The

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[2] Eagle Downs Racing Association, a corporation licensed by the Pennsylvania Horse Racing Commission to conduct parimutuel thoroughbred racing in Pennsylvania, was dismissed from this case by order of the district court on December 5, 1979.

Court ruled that a jockey fee schedule was simply one part of a pervasive system of regulation and supervision of an otherwise criminal activity.

In light of the Supreme Court's decision in *Gilligan*, the Pennsylvania Horse Racing Commission filed a motion for summary judgment in this case arguing that the promulgation of a jockey fee schedule was immune from antitrust attack based upon the state action exemption first elucidated in *Parker v. Brown*, 317 U.S. 341 (1943).

The District Court relying in part upon *Gilligan* and upon the decisions of this Court in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), and *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum*, 445 U.S. 97 (1980), granted the Commission's motion holding

> "In view of the decision of the Pennsylvania Supreme Court emphatically holding that the Commission had authority to set jockeys' fees, it is now evident that the defendants are immune from antitrust liability under Parker v. Brown, and, therefore, summary judgment must be granted in their favor."

Petitioners filed an appeal to the Third Circuit which affirmed the decision of the District Court. *Euster v. Eagle Downs Racing Ass'n.*, 677 F.2d 992 (3rd Cir. 1982). The Court of Appeals also relied heavily upon the decision of the Pennsylvania Supreme Court in *Gilligan*. The Court of Appeals determined that the ruling in *Gilligan* explicitly demonstrated that the action complained of was clearly contemplated by the Pennsylvania General Assembly and was within the powers of the Pennsylvania Horse Racing Commission. The Court of Appeals then went on to determine that the Horse Racing Commission, an agency of the Commonwealth of Pennsylvania, actively supervised

the jockey fee schedule thereby satisfying the second prong of the *City of Lafayette—Midcal* test.

In its decision the Court of Appeals took great pains to distinguish between the antitrust immunity available to a state agency such as the Pennsylvania Horse Racing Commission and that immunity available to a subordinate creation of the state such as a public utility or a municipality.

Petitioners have filed this petition for writ of certiorari, seeking review of that decision.

ARGUMENT

I. The Decision of the Court of Appeals for the Third Circuit Does Not Conflict With Decisions of Other Courts of Appeal

Petitioners first contend that this Court should grant certiorari because of an alleged conflict among the Courts of Appeal involving immunity from antitrust liability based upon the principles of *Parker v. Brown*, 317 U.S. 341 (1943). Specifically, Petitioners allege that the decision of the Third Circuit in *Euster* is in conflict with the decision of the Fifth Circuit in *United States v. Texas State Board of Public Accounting*, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 444 U.S. 925 (1979), and the decision of the First Circuit in *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981). An examination of these cases clearly reveals the Petitioners' contention is without merit. No conflict exists.

Texas State Board involved a professional licensing board which proposed a rule prohibiting public accountants from making competitive bids for professional services. However, rules passed by the Board became effective only *after* approval by a majority of licensed public accountants voting on the referendum. As such, the ruling in *Texas State Board* is simply a natural corollary of this Court's decisions in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), and *New Motor Vehicle Bd. of Cal. v. Orrin Fox Co.*, 439 U.S. 96 (1978), and in complete harmony with the decision of the Third Circuit in *Euster*.

Midcal and *New Motor Vehicle Bd.* stand for the proposition that when a state is not acting as sovereign or

has delegated its powers to a subordinate entity, the challenged activity must be actively supervised by the state. In other words, the anti-competitive activity must meet the second criterion for antitrust immunity enumerated in *Midcal* and *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). The anti-competitive activity in *Texas State Board* was neither undertaken by nor actively supervised by the state. To the contrary, it was action taken by a majority vote of private parties without active supervision by the state. In fact it represents very nearly the same scheme which this Court invalidated in *Midcal*, where a wine pricing system was left entirely to private producers and wholesalers.

The situation in *Midcal* and *Texas State Board* contrasts sharply with the facts at issue in this case. The jockey fee schedule is established, reviewed and enforced solely by an agency of the Commonwealth of Pennsylvania pursuant to the procedures established by Pennsylvania law.[3] It is a regulation of the Commonwealth of Pennsylvania and, unlike *Texas State Board*, it does not represent a delegation of the Commonwealth's authority to a private body.

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[3] The jockey fee schedule was promulgated pursuant to the Commonwealth Documents Law, 45 P.S. §1102, *et seq.*, that Pennsylvania statute setting forth the requirements that Commonwealth agencies must follow in order to enact a regulation. Petitioners as well as representatives of the jockeys were present at both Commission meetings where the schedule was dismissed. Complaint §9. Further, the Commission actively supervises the schedule and may hold hearings regarding violations as was noted in the opinion of the Third Circuit below, *Euster v. Eagle Downs Racing Ass'n.*, 677 F.2d 992, 995 (3rd Cir. 1982). The situation therefore closely parallels that in *New Motor Vehicle Bd. of Cal. v. Orrin Fox Co.*, 439 U.S. 96 (1978).

In addition to failing the second prong of the *City of Lafayette-Midcal* standard, it is doubtful that the rule in *Texas State Board* satisfied the first requirement; that the anti-competitive activity be clearly articulated and affirmatively expressed. The District Court's opinion in *United States v. Texas State Board of Accounting*, 464 F. Supp. 400, 404 (W.D. Texas 1978), which was affirmed by the Fifth Circuit, states "[a]dditionally, it cannot be stated that Section 5 of the [Texas Public Accounting] Act in any way concerns or contemplates 'the kind of action complained of' here." The jockey fee schedule, on the other hand, is clearly articulated and affirmatively expressed as Pennsylvania policy. That was the holding of the Pennsylvania Supreme Court in *Gilligan v. Pennsylvania State Horse Racing Commission*, 492 Pa. 90, 422 A.2d 487 (1980).[4]

Turning to *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981), it is quite obvious that any attempt to create a conflict between *Euster* and *Corey* utterly fails. *Corey* addressed the issue of municipal immunity and turned on the question of whether the Commonwealth of Massachusetts had clearly articulated and affirmatively expressed a policy allowing the town of Falmouth to undertake certain questionable activities, i.e., excluding the plaintiff from bidding to supply a parking garage. The instant case deals with *Parker* immunity available to the Commonwealth of Pennsylvania, not municipalities. Petitioners' arguments notwithstanding, the Horse Racing Commission is part of the Commonwealth of Pennsylvania, *Euster v. Pennsylvania*

[4] The decision of the Pennsylvania Supreme Court in *Gilligan* which expressly stated that the Horse Racing Commission has the authority to promulgate a regulation establishing a jockey fee schedule, and its relationship with this case, are discussed in greater detail in Section II of this brief.

Horse Racing Commission, 431 F. Supp. 828 (E.D. Pa. 1977).[5]

In short, any supposed conflict among the Courts of Appeals created by *Euster* is, in fact, a result of confusion among Petitioners. The decision of Third Circuit in *Euster* is easily harmonized with both *United States v. Texas State Board of Public Accounting*, 592 F.2d 919 (5th Cir. 1979), and *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981).

II. The Third Circuit Decided the Instant Matter in Full Accord With Applicable Precedent

Petitioners next argue that the decision of the Court of Appeals conflicts with several prior decisions of this Court. Though somewhat confused, Petitioners' premise is either that the Pennsylvania Horse Racing Commission should be treated as a municipality for the purpose of anti-trust immunity, or that the Commission's authority to promulgate a jockey fee schedule is not clearly articulated and affirmatively expressed. Both arguments are without merit.

Petitioners contend that there is no principled basis in the precedent of this Court for distinguishing between

[5] The above-cited case involved an action brought against the Pennsylvania Horse Racing Commission, among others, by Eugene Euster, one of the Petitioners in the instant action. Mr. Euster alleged a deprivation of his civil rights pursuant to Title 42 U.S.C. §1983. The court ruled that, although not specifically named as a party, the Commonwealth of Pennsylvania was, in fact, the real party defendant. Thus, the court concluded that the Horse Racing Commission is a part of the Commonwealth. That decision should act as collateral estoppel to any assertion that the Commission is not part of the Commonwealth of Pennsylvania.

state agencies and municipalities. This statement flatly ignores the rulings of this Court in *Community Communications, Inc. v. City of Boulder,* U.S. , 102 S.Ct. 835 (1982); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), and *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum,* 445 U.S. 97 (1980).

In *Midcal* this Court stated:

> . . . immunity for state regulatory programs is grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' In Parker v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' the Court concluded that state regulatory programs could not violate it.

445 U.S. at 103-04.

Recently, in *City of Boulder,* this Court took great pains to distinguish the antitrust immunity available to a municipality and that immunity available to a state. The distinction is quite simple, a state is sovereign, a municipality is not, but rather a creation of the state. "The state as sovereign is immune from antitrust liability. [T]hus, *Parker* recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty." 102 S.Ct. at 842.

This Court in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), was faced with the question of whether actions of the Arizona Supreme Court were entitled to *Parker v. Brown* immunity. The Court held that the alleged anti-

competitive action was under the affirmative control of the Arizona Supreme Court "the ultimate body for weilding the State's power over the practice of law." It then concluded that the claim was directed against the state, ruling that the Arizona Supreme Court and the state are one and the same.

As in *Bates*, the Pennsylvania Horse Racing Commission is a part of the sovereign Commonwealth of Pennsylvania and cannot be separated therefrom. *Euster v. Pennsylvania Horse Racing Commission*, 431 F. Supp. 828 (E.D. Pa. 1977). Article IV, Section 1, of the Pennsylvania Constitution states that the Executive Department of the Commonwealth shall consist of the Governor, several other specifically enumerated officers, and such other officers as the General Assembly may prescribe. The General Assembly, through the enactment of the Race Horse Industry Reform Act, Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. §325.101, *et seq.*,[8] has provided for the Horse Racing Commission as a part of the Commonwealth of Pennsylvania. Petitioners' arguments to the contrary are simply wrong.

Petitioners' argument, that the Commission's authority to promulgate a jockey fee schedule is not clearly articulated or affirmatively expressed, is rebutted on two counts.

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[8] On December 17, 1980 the Pennsylvania General Assembly repealed the so-called Pennsylvania Horse Racing Act, Act of December 11, 1967, P.L. 707, No. 331, 15 P.S. §2651, and replaced it with the Race Horse Industry Reform Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. §325.101, *et seq.* The Race Horse Industry Reform Act accomplished a number of matters; however, it did not change the powers and duties of the Pennsylvania Horse Racing Commission. The powers of the Horse Racing Commission relied upon by the Court in *Gilligan* are continued verbatim in the Race Horse Industry Reform Act.

First, that test should not be applied to a state acting within its sovereign capacity and, secondly, even if applied, the decision in *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 90, 422 A.2d 487 (1980), has irretrievably disposed of that argument.

Respondents have consistently argued that the standard enumerated in *City of Lafayette* and *Midcal* should not be applied to this case. That language was developed in cases involving public entities created by the state such as municipalities and public utilities. It, therefore, should not be applied where the defendant is the state itself acting pursuant to its authority under state law. In such circumstances there can be no question of active supervision by the state. Thus, the second prong of the *City of Lafayette —Midcal* test is rendered meaningless.

In any case, even applying that standard, the Pennsylvania Horse Racing Commission prevails. Specifically, the assertion that the Commissioners' authority to promulgate a jockey fee schedule is not clearly articulated and affirmatively expressed cannot survive review of the decision of the Supreme Court of Pennsylvania in *Gilligan v Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980).

> A pervasive system of regulation and supervision of this otherwise criminal activity was thus contemplated by the Commissioners' broad legislative mandate, and a general rulemaking power was clearly and unmistakably conferred.
>
> * * * *
>
> The latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary to accomplish the express

> legislative purpose. The breadth of the Commission's powers is required for the prevention of corruption and the maintenance of high standards and public confidence in racing. The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed necessary to accomplish—the legislative goals.

492 Pa. at 97, 98, 422 A.2d at 490-91.

Petitioners' contention that the Third Circuit's decision would convert the availability of the *Parker* exemption to a matter of state law misses the point entirely. The issue of whether a state or subordinate government entity such as a municipality is entitled to *Parker* immunity is determined by the application of federal law. However, the first criterion of the *City of Lafayette—Midcal* test, whether the challenged restraint is clearly articulated and affirmatively expressed, is a question of state law dealing with the powers of a particular agency of state government. As such, the first prong of the test must be determined by reference to state law. In the present case, the highest court of the Commonwealth of Pennsylvania has determined, as a matter of state law, that the Horse Racing Commission has authority to promulgate a jockey fee schedule. That determination is binding upon this Court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

III. This Case Presents No Unresolved Questions of Federal Law Which Should Occasion This Court's Exercise of Jurisdiction

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The final issue is Petitioners' allegation that the recent pronouncements of this Court, involving the antitrust immunity available to municipalities and quasi public en-

tities such as public utilities, have so confused the issue of state immunity that certiorari should be granted to settle the matter. However, the matter of state immunity from the federal antitrust law has been and continues to be well settled.

The original pronouncements of this Court concerning state antitrust immunity made in *Parker v. Brown*, 317 U.S. 341 (1943), are axiomatic. A regulatory program adopted by and supervised by the state pursuant to its sovereign powers is not subject to the Sherman Act. This principle was most recently affirmed in *Community Communications Co. v. City of Boulder*, U.S. , 102 S.Ct. 835 (1982). In *City of Boulder* this Court rejected the automatic extension of *Parker v. Brown* immunity to municipalities, however it expressly reaffirmed that immunity for the states.

> When Parker examined Congress' intentions in enacting the antitrust laws, the opinion noted that 'nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress.' 317 U.S. at 350-351, 63 S.Ct. at 313-14 (emphasis added). Thus Parker recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty.

102 S.Ct. at 842.

The concept of federalism certainly contemplates sovereignty over the pari-mutuel thoroughbred horse racing industry, "an otherwise criminal activity," by the Commonwealth of Pennsylvania, *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 97, 422 A.2d 487,

490 (1980). Further, the Commonwealth of Pennsylvania contemplated the imposition of a jockey fee schedule when it created the Pennsylvania Horse Racing Commission, *Gilligan, supra,* 492 Pa. at 98-99, 422 A.2d at 490-491.

In fact Petitioners cite no cases for their argument that certiorari should be granted to resolve questions raised by recent application of the *Parker* doctrine. Those cases cited elsewhere in Petitioners' brief are, in fact, explicitly harmonized in *Community Communications Co. v. City of Boulder,* 102 S.Ct. at 840-42. The matter of state antitrust immunity continues to be settled pursuant to *Parker v. Brown,* and successive opinions of this Court have so stated.

Finally, the cited opinions of the Attorneys General of Delaware and Vermont are unpersuasive. In both instances the determination turned on the question of whether there was express language authorizing the anticompetitive conduct. As previously discussed, that contention in light of *Gilligan* cannot be seriously debated in this case.

CONCLUSION

For all of the foregoing reasons, petitioners request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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